TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1924

No. [redacted]331

JAMES C. DAVIS, AGENT, PLAINTIFF IN ERROR,

vs.

L. L. COHEN & COMPANY, INC.

IN ERROR TO THE SUPERIOR COURT OF BRISTOL COUNTY OF THE STATE OF MASSACHUSETTS

Compliments with the method pursued

FILED MARCH 20, 1924

(30,209)

May 09 — [illegible]
for stat of limitations

Feb. 1919 statement came back to Ch Ct —
Act brot Jan '20 against the M & H R R — Not Dy —
Mot to dsp 21. 1922. pet. summons oct 7 —
This too late. 6/0. 2 years & 1 da. See 206 a adopted
State stat — Dy & worth time of two years
of this Mot 1922. Dy Ap & Mo to dis p 7
McK W/4? Cas p 7 - Mass Stat p 14 & 20 Rep

(30,209)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 899

JAMES C. DAVIS, AGENT, PLAINTIFF IN ERROR,

vs.

L. L. COHEN & COMPANY, INC.

IN ERROR TO THE SUPERIOR COURT OF BRISTOL COUNTY OF THE STATE OF MASSACHUSETTS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 20, 1924

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[fol. 1] COMMONWEALTH OF MASSACHUSETTS:

JUDGE'S CERTIFICATE TO CLERK

I, Walter Perley Hall, Chief Justice of the Superior Court of the Commonwealth of Massachusetts, do certify that Edwin L. Barney, Esquire, whose signature is affixed to the papers hereunto annexed, is Clerk of said Superior Court for the County of Bristol, and hath the keeping of the files, records and proceedings of said Court within and for said County; that he is, by law, the proper person to make out and certify copies of the files, records and proceedings of said Court; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid; and that his attestation to the papers hereunto annexed, of the files, records and proceedings of the said Superior Court, is in due form.

In testimony whereof, I have set my hand, and caused the seal of said Court to be hereunto affixed, this eighteenth day of March, in the year of our Lord one thousand nine hundred and twenty-four.

Walter Perley Hall, Chief Justice of the Superior Court.

(Seal of the Superior Court.)

[fol. 2] COMMONWEALTH OF MASSACHUSETTS,
Bristol, ss:

CLERK'S CERTIFICATE TO JUDGE

I, Edwin L. Barney, Clerk of the Superior Court within and for said County of Bristol, hereby certify that the Honorable Walter Perley Hall, by whom the foregoing certificate was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, Chief Justice of the Superior Court of said Commonwealth, duly commissioned and qualified; to all of whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In witness whereof, I have hereto set my hand and affixed the seal of said Court, this eighteenth day of March in the year of our Lord one thousand nine hundred and twenty-four.

Edwin L. Barney. (Seal of the Superior Court.)

[fol. 3] COMMONWEALTH OF MASSACHUSETTS,
Bristol, ss:

To all persons to whom these presents shall come, Greeting:

Know ye, that among our records of our Superior Court for the said County of Bristol it is thus contained, the following being the entire record in the case:

COMMONWEALTH OF MASSACHUSETTS,
Bristol, ss:

IN SUPERIOR COURT OF BRISTOL COUNTY

SUMMONS AND RETURN

(Seal.) To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of The New York, New Haven & Hartford Railroad Company, a corporation duly organized by law and having an usual place of business in the city of Taunton, and controlled and operated by the United States Railroad Administration, to the value of Two Thousand Dollars and to summon the said The New York, New Haven & Hartford Railroad Company (if it may be found in your precinct) to appear before our Justices of our Superior Court, to be holden at Taunton within and for our said County of Bristol, on the first Monday of February next; then and there in our said Court to answer unto L. L. Cohen & Co., Inc., a corporation duly organized by law and having an usual place of business in said Taunton, in an action of Contract, to the damage of the said L. L. Cohen & Co., Inc. (as it says) the sum of Two Thousand Dollars which shall then and there be made to appear, with other due damages. And have you there this Writ with your doings therein.

Witness, John A. Aiken, Esquire, at Taunton, the ninth day of January in the year of our Lord one thousand nine hundred and twenty.

Simeon Borden, Clerk.

[fol. 4] On which said writ return of service was made in the words and figures following, to wit:

BRISTOL, ss:

January 13, 1920.

By virtue of this writ I this day attached a chip as the property of the within named defendant corporation and on the same day I summoned it for its appearance at Court by giving in hand to Ruel S. Harvey, Chief Clerk, for the within named defendant corporation a summons of this writ together with a true and attested copy.

Charles J. Nichols, Deputy Sheriff.

Fees:

Service	$1.00
Copy	1.00
Travel	.10
	$2.10

SUPERIOR COURT OF BRISTOL COUNTY

L. L. COHEN & CO., INC.,

vs.

THE NEW YORK, NEW HAVEN & HARTFORD R. R. COMPANY

DECLARATION

And the plaintiff says that the defendants were common carriers with an usual place of business in the city of Taunton, and that on the 13th day of December, 1918, the Plaintiff caused to be shipped from said Taunton on one of the cars owned and operated by the defendant, its servants or agents, in the conduct of its business as common carrier, one carload of scrap iron, on Car Initial Wab. Car No. 28493 consigned to Midvale Steel & Ordnance Company, Coatesville, Pa., by P. R. R. route, same being in good order and condition when shipped, and which was to be taken care of and to be safely and securely conveyed by the defendant corporation in like good order and condition and in consideration thereof and of a reasonable [fol. 5] compensation paid it by the Plaintiff the said defendants became by law bound and obliged as common carriers as aforesaid, and undertook and promised the plaintiff to take care of and safely convey the said goods, and deliver the same as aforesaid; yet the defendants did not take care of and securely convey and deliver said goods in good order and condition to the said Midvale Steel & Ordnance Company, and on the contrary conducted itself in direct violation of its contract with the plaintiff so that when the iron was delivered in Coatesville, the consignee refused to accept the same by reason of the poor condition which was caused by the failure of the defendant, its agents or servants, to comply with its contract, whereby the plaintiff suffered great damage as stated in its writ.

L. L. Cohen & Co., Inc., by its Attorneys, Louis Swig, Irving Bertman.

APPEARANCE FOR DEFENDANT

On said 1st Monday of February A. D. 1920, the plaintiff appeared by Louis Swig, Esquire, and Irving Bertman, Esquire, its Attorneys as aforesaid and entered the above entitled action.

Thereafter on the 17th day of February A. D. 1920 the following appearance, in writing, was entered, to wit:

BRISTOL, ss:

SUPERIOR COURT

L. L. COHEN & Co., INC.,

vs.

THE NEW YORK, NEW HAVEN & HARTFORD R. R. Co.

In the above action I appear for the defendant.
F. A. Farnham. B.

[fol. 6] SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

DEFENDANT'S ANSWER—Filed February 17, 1920

The defendant denies each and every allegation in plaintiff's writ and declaration set forth.

And further answering, the defendant says that at the time of the alleged injury the plaintiff was guilty of negligence which contributed to said injury.

By Its Attorney, F. A. Farnham. B.

SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

APPEARANCE—Filed July 1, 1920

In the above action I appear for the defendant.
A. W. Blackman, 591 South Station, Boston, Mass.

SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

PLAINTIFF'S MOTION TO AMEND WRIT AND DECLARATION—Filed September 21, 1922

Now comes the plaintiff in the above-entitled matter and prays that the writ and declaration be amended by striking out the name [fol. 7] New York, New Haven & Hartford Railroad Company, wherever the same appears and by substituting in place therefor the following: James C. Davis, Agent, and the Director General of Rail-

roads, in possession and control of the New York, New Haven and Hartford Railroad Company, as party defendant.

L. L. Cohen & Co., Inc., by Its Attorneys, Louis Swig, Irving Bertman.

The foregoing motion was duly allowed on said twenty-first day of September A. D. 1922 and process ordered to issue.

SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

MOTION TO CONTINUE CASE ON THE DOCKET—Filed September 26, 1922

Now comes the plaintiff herein and prays that the above-entitled case be allowed to remain on the docket, and says that this case was ready for trial at the sitting of Court held at Taunton, September 1921, but the presiding Justice declined to hear the case. The case was marked for trial at the March, 1922 term but was not reached because assigned cases occupied the entire term of Court. The case was marked for trial at the September 1922 sitting at Taunton at which time motion was made, and allowed, for the substitution of another party defendant, and the case was continued until the next term of Court at Taunton.

L. L. Cohen & Co., Inc., by Its Attorney, Louis Swig.

[fol. 8] Jurat showing the following was duly sworn to by Louis Swig omitted in printing.

SUPERIFR COURT OF BRISTOL COUNTY

[Title omitted]

ORDER TO GIVE NOTICE AND RETURN—October 7, 1922

This is an action of contract to recover two thousand dollars ($2,000) alleged to be due to the plaintiff from the defendant on the ninth day of January A. D. 1920 as set forth in the plaintiff's writ of that date.

And now, it appearing in the above-entitled case that a motion to amend the writ and declaration in said case by striking out the name New York, New Haven and Hartford Railroad Company wherever the same appears and substituting in place thereof the following, James C. Davis, Agent and Director General of Railroads in possession and control of the New York, New Haven and Hartford Railroad Company as party defendant was filed and allowed September

21, 1922, and it further appearing that no personal service of said writ has been made upon said defendant James C. Davis, Agent and Director General, it is ordered by the court, here, that the plaintiff [fol. 9] give notice to the said James C. Davis, Agent and Director General as aforesaid, of the pendency of this action, and to appear before said Court to be held at Taunton within and for the County of Bristol, on the first Monday of November next, to answer to the same, by causing the said James C. Davis, Agent and Director General as aforesaid, to be served with an attested copy of this order fourteen days at least before the first Monday of November next; and that this action be continued until notice shall be given to the defendant James C. Davis, Agent and Director General as aforesaid, agreeably to this order.

Simeon Borden, Clerk.

Afterwards, to wit, on the twentieth day of October, 1922, the aforesaid order was returned into Court with the following endorsed thereon, to wit:

Oct. 11, 1922.

BRISTOL, ss:

I have this day served the within order of notice upon the within named James C. Davis, Agent and Director General of Railroads, by giving in hand to Ruel S. Harvey, Chief Clerk for the New York, New Haven and Hartford Railroad Co., a true and attested copy of this order of notice.

Charles J. Nichols, Deputy Sheriff.

Fees:

Service	$1.00
Copy	1.00
Travel	.10
	$2.10

SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

SPECIAL APPEARANCE FOR DEFENDANT—Filed November 7, 1922

The Clerk will please enter my appearance specially for James C. Davis, alleged agent for the purpose of contesting jurisdiction.

A. W. Blackman, Attorney Appearing Specially.

[fol. 10] SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

MOTION TO DISMISS—Filed November 7, 1922

Now comes James C. Davis, defendant herein alleged Agent and Director General appearing specially for the purpose of this motion, and without consenting to the jurisdiction of this Court moves that the service of the writ summoning said defendant to appear and answer be set aside and that this action as against him be dismissed upon the following grounds:

1. That this Court is without jurisdiction to entertain this action against the above-named defendant.

2. That the issuance and service of said writ summoning the above-named defendant to appear and answer are null and void because in violation of and in conflict with Sec. 206 of the Act of Congress of February 28, 1920, known as the Transportation Act.

3. That this proceeding against the above-named defendant was not instituted within the time prescribed by the said section of the Transportation Act.

4. That this action as against the above-named defendant was not instituted in the manner provided by the above-named section of the Transportation Act.

5. That no service has been made upon said defendant as required by the Transportation Act.

6. That no service has been made upon said defendant in accordance with the provisions of the General Laws of this Commonwealth, [fol. 11] and that under said laws this Court has no jurisdiction to entertain this action against said defendant.

7. That the provisions of the General Laws of said Commonwealth under authority of which the above-named defendant is summoned as party defendant in this action, if they purport to authorize the proceedings herein, are repugnant to the provisions of the Transportation Act and, therefore, said proceedings are null and void and without authority of law.

8. That it appears from the record of the return on the writ herein issued to the above-named defendant that no service of said writ has been made upon the above-named defendant in accordance with the provisions of the laws of Massachusetts and, therefore, such service is null and void.

Wherefore, the above-named defendant says that he should not be held to answer herein; that the service of the writ herein should be set aside; and that this action as against him should be dismissed.

James C. Davis, Alleged Agent, by his attorney appearing specially for the purpose of this motion, A. W. Blackman.

On the second day of January A. D. 1923, said motion to dismiss was denied by the Court and the defendant was allowed ten (10) days in which to file answer.

Also, on the second day of January A. D. 1923, the motion under Rule 63, was allowed by the Court.

On the fourth day of January, A. D. 1923, the defendant filed a claim of exceptions and appeal.

SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

[fol. 12] DEFENDANT'S ANSWER—Filed January 4, 1923

Now comes James C. Davis, Alleged Agent and not waiving his motion to dismiss heretofore filed in said cause, but relying upon the same, and not admitting the jurisdiction of this Court over said defendant, files this answer in compliance with an order of Court, and says

1. That this Court has no jurisdiction over this defendant in this action for the reasons more fully set forth in detail in this defendant's motion to dismiss heretofore filed, and this defendant expressly relies upon said grounds of defense as if set forth more fully herein.

2. And further answering this defendant denies each and every allegation in the plaintiffs' writ and declaration contained.

3. And for further answer this defendant says that the plaintiffs' alleged cause of action arises out of and in connection with a shipment of freight in interstate commerce from Whittenton, Mass., to Coatesville, Pa., on or about December 13, 1918; that a reasonable time for delivery of said shipment at said destination was not later than two months after said December 13, 1918; that said shipment was refused by the consignee at said destination and returned to the plaintiff at Taunton, at which point it was tendered for delivery to the plaintiff on or about February 20, 1919; that the plaintiff thereupon on said February 20, 1919, refused to accept said shipment; that said shipment of freight was made under and in pursuance with the terms and conditions of a bill of lading of standard form, one of the conditions of which was that "suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed"; that plaintiffs' action or proceeding against this defendant was begun by writ of attachment or other process dated October 7, 1922, and returnable in this Court the first Monday of November, 1922; that said process was attempted to be served on October 16, 1922, by leaving an attested copy thereof

[fol. 13] with H. E. Astley, Division Superintendent at Taunton, Mass., of the New York, New Haven and Hartford Railroad Company; that if it be held that said attempted service was a good service upon this defendant yet this defendant says that said action was not begun against this defendant within the period of two years and one day required under the terms and conditions of said bill of lading.

James C. Davis, Alleged Agent, by His Attorney, A. W. Blackman.

On the sixth day of January, A. D. 1923, the defendant filed a bill of exceptions to the overruling of the motion to dismiss which was filed November 7, 1922, and said bill of exceptions was allowed by the Court on the thirteenth day of March, A. D. 1923. A copy of said bill of exceptions is annexed hereto.

SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

VERDICT—September 17, 1923

The Jury find for the Defendant by direction of Court.

William R. Chase, Foreman.

September 17, 1923.

On the sixth day of October A. D. 1923, a report to the Supreme Judicial Court was filed. A copy of said report is annexed hereto. Thence the suit was continued from time to time until the fifth day of January A. D. 1924, when, on said day, the following Record was received in our said Superior Court, to-wit:

[fol. 14] SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

REPORT TO THE SUPREME JUDICIAL COURT

This is an action of contract in which the plaintiff seeks to recover damages to a carload of scrap iron shipped by the plaintiff in December 1918. The pleadings are made a part hereof and may be referred to.

After the defendant's motion to dismiss was overruled by Duque, J., which ruling is the subject of defendant's bill of exceptions to be argued herewith, said Davis was ordered to answer and filed an answer as follows:

"Now comes James C. Davis, Alleged Agent and not waiving his Motion to Dismiss heretofore filed in said cause, but relying upon the same, and not admitting the jurisdiction of this Court over said defendant, files this answer in compliance with an order of Court, and says

1. That this Court has no jurisdiction over this defendant in this action for the reasons more fully set forth in detail in this defendant's Motion to Dismiss heretofore filed, and this defendant expressly relies upon said grounds of defense as set forth more fully therein.

2. And further answering this defendant denies each and every allegation in the plaintiff's writ and declaration contained.

3. And for further answer this defendant says that the plaintiff's alleged cause of action arises out of and in connection with a shipment of freight in interstate commerce from Whittenton, Mass., to Coatesville, Pa., on or about December 13, 1918; that a reasonable time for delivery of said shipment at said destination was not later than two months after said December 13, 1918; that said shipment was refused by the consignee at said destination and returned to the plaintiff at Taunton at which point it was tendered for delivery to the plaintiff on or about February 20, 1919; that the plaintiff there- [fol. 15] upon on said February 20, 1919 refused to accept said shipment; that said shipment of freight was made under and in pursuance with the terms and conditions of a bill of lading of standard form, one of the conditions of which was that "suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed"; that plaintiff's action or proceeding against this defendant was begun by writ of attachment or other process dated October 7, 1922 and returnable in this Court the first Monday of November 1922; that said process was attempted to be served on October 16, 1922 by leaving an attested copy thereof with H. E. Astley, Division Superintendent at Taunton, Mass., of the New York, New Haven and Hartford Railroad Company; that if it be held that said attempted service was a good service upon this defendant yet this defendant says that said action was not begun against this defendant within the period of two years and one day required under the terms and condition of said bill of lading."

The action came on for trial before me and a jury, September 17, 1923. At the trial there was evidence offered by the plaintiff, which was not disputed by the defendant, that the plaintiff on receipt of an order from The Perry, Buxton, Doane Company shipped from Taunton, Mass., December 13, 1918, scrap iron consigned to Midvale Steel & Ordnance Company, Coatesville, Pa. The property shipped was described as "one carload scrap iron" and was loaded into and forwarded in car Wabash 28493. At time of shipment the plaintiff sent an invoice for the value of the car, namely,

$1095.37 to The Perry, Buxton, Doane Company, which concern on receipt of said invoice and the bill-of-lading paid the plaintiff on account 75% of the invoice. In loading the car the plaintiff placed at one end of the car sheet iron scrap, which was tied up in bundles. At the other end of the car the plaintiff loaded skeleton scrap so-called, which was tied up in bales. In the middle of the car, plaintiff loaded what was called tack or nail scrap, which consisted of very small particles resulting from the manufacture of tacks or nails. The car Wabash 28493 into which the shipment was loaded was what is known as a "sideboard flat." That is, it was a flat car open at the top with wooden sides and ends, perhaps four feet in height. The scrap was loaded into the car as described, but without any partitions or other means of separation between the kinds of scrap. The car in question was shipped to fill an order secured by The Perry, Buxton, Doane Company at the market price prevailing on the date of the Armistice in the great War. Subsequent to the Armistice the market dropped sharply.

[fol. 16] The defendant admitted, and it was stipulated, that while the car was in transit between Taunton, Mass., and Coatesville, Pa., and on the lines of Pennsylvania System it became reasonably necessary to transfer the contents from the original car, and that the contents of the car were so transferred from the original car into car Penn 261461, which was known as a battleship hopper car. This car was described by witnesses as being a large steel car with sides as high as a man could reach and with one or two hoppers on the bottom which were contrivances in the shape of a "V" which could be opened to permit unloading through the botttom. The scrap iron in question weighed 104410 pounds. A witness for the plaintiff testified that this battleship type of car was not adapted to the carriage of scrap iron by reason of the greatly enhanced cost of unloading.

It appeared that the scrap iron in Penn car 261461 went to Coatesville, Pa., at which point the consignee, the Midvale Steel & Ordnance Company refused to accept delivery. Subsequently, on orders of the shipper, the car was forwarded to Spring City, and on orders of the shipper the car was returned to Taunton, Mass., consigned to the plaintiff, where it arrived about February 19, 1919, having been all the time in the possession of the carriers, it appeared that when the lading was transferred from the original car into Penn car 261461 all of the fine scrap was loaded on top and mixed in with the other material, the coarser material being the sheet and skeleton scrap being on the bottom, and the bundles and bales of the sheet and skeleton scrap being to a great extent broken so that the lading on its return to Taunton was in a badly mixed up condition and unmarketable. On the return of the car to Taunton, the plaintiff declined to take delivery of the scrap iron. Witnesses for the plaintiff testified that when the car was returned to Taunton the scrap being in a battleship car and being in such a mixed up condition, in view of the then prevailing market price and the carrier charges outstanding on the car it would not pay to take the car and handle it. A salesman employed by The Perry, Buxton, Doane

Company who had had many years' experience in buying and selling scrap iron testified that if the car arrived at Coatesville, Pa., in the mixed up condition which it showed on its return at Taunton, Mass., after having been transferred it would not have paid the original consignee to have unloaded and attempted to handle the scrap iron. According to this witness the consignee and all other mills desired its scrap iron only when done up in sizeable bales or bundles and not mixed up. In the opinion of the witnesses for the plaintiff, the scrap iron in question was worthless after the transfer had been made.

[fol. 17] The plaintiff testified that subsequent to the return of the car to Taunton, the plaintiff paid back to The Perry, Buxton, Doane Company the amount which had been received from that company immediately following the shipment of the car.

The foregoing is all of the evidence material to this report. It is agreed by counsel that the original bill of lading may be used in the argument before the Full Court.

At the close of the evidence I directed a verdict for the defendant, to which the plaintiff excepted. I report the case to the Supreme Judicial Court at the request of the parties and upon their agreement that if the exception to Judge Dubuque's ruling is sustained, or if the Supreme Judicial Court sustains my ruling, the verdict shall stand; if the Supreme Judicial Court overrule the defendant's exceptions to Judge Dubuque's ruling and sustain the plaintiff's exception to my ruling, a verdict for the plaintiff shall be ordered in the sum of $400 which amount was agreed upon by the parties for the purpose of this case in consideration of a collateral agreement respecting the carrier's charges on this car.

Marcus Morton, Justice of the Superior Court.

Oct. 6, 1923.

IN SUPERIOR COURT OF BRISTOL COUNTY

DEFENDANT'S EXCEPTIONS TO REPORT

The plaintiff having an alleged cause of action against the United States Railroad Administration, arising out of or connected with a shipment of freight from Taunton, Mass., to Coatesville, Pa., shipped in December, 1918, not delivered at destination and returned for delivery to the plaintiff at Taunton, brought an action by writ dated January 9, 1920, against the New York, New Haven and Hartford Railroad Company, a Massachusetts corporation.

On September 21, 1922, the plaintiff filed a motion in said proceeding to be allowed to substitute as party defendant in place of The New York, New Haven and Hartford Railroad Company, James C. Davis, Alleged Agent, which motion was allowed. Thereafter, to wit, on October 7, 1922, an order of notice was issued from said Court directing the plaintiff to give notice to said James C. Davis of the pendency of said action and requiring said Davis to appear and answer on the first Monday of November, 1922. Said order

[fol. 18] of notice was served by leaving an attested copy thereof with H. E. Astley, Division Superintendent of said New York, New Haven and Hartford Railroad Company at said Taunton on October 16, 1922. Service on said Astley would have been good service in an action against the N. Y., N. H. and H. R. Co.

Thereafter, to wit, on November 6, 1922, said James C. Davis, the present defendant, appeared specially by counsel and filed a motion to dismiss as follows:

"Now comes James C. Davis defendant herein alleged Agent and Director General appearing specially for the purpose of this motion, and without consenting to the jurisdiction of this Court moves that the service of the writ summoning said defendant to appear and answer be set aside and that this action as against him be dismissed upon the following grounds:

1. That this Court is without jurisdiction to entertain this action against the above named defendant.

2. That the issuance and service of said writ summoning the above named defendant to appear and answer are null and void because in violation of and in conflict with Sec. 206 of the Act of Congress of February 28, 1920, known as the Transportation Act.

3. That this proceeding against the above named defendant was not instituted within the time prescribed by the said section of the Transportation Act.

4. That this action as against the above named defendant was not instituted in the manner provided by the above named section of the Transportation Act.

5. That no service has been made upon said defendant as required by the Transportation Act.

6. That no service has been made upon said defendant in accordance with the provisions of the General Laws of this Commonwealth, and that under said laws this Court has no jurisdiction to entertain this action against said defendant.

7. That the provisions of the General Laws of said Commonwealth under authority of which the above named defendant is summoned as party defendant in this action, if they purport to authorize the proceedings herein, are repugnant to the provisions of the Transportation Act and, therefore, said proceedings are null and void and without authority of law.

8. That it appears from the record of the return on the writ herein issued to the above named defendant that no service of said writ has been made upon the above named defendant in accordance with the provisions of the laws of Massachusetts and, therefore, such service is null and void.

[fols. 19-21] Wherefore, the above named defendant says that he should not be held to answer herein; that the service of the writ

herein should be set aside; and that this action as against him should be dismissed."

Thereafter, to wit, on January 2, 1923, said motion was presented to the Court and was overruled, to which action of the Court the defendant duly excepted.

Wherefore, being aggrieved by the action of the Court in overruling said motion to dismiss, the defendant Davis files this his Bill of Exceptions and prays that the same may be allowed.

James C. Davis, Alleged Agent, by His Attorney A. W. Blackman.

Exceptions allowed. Hugo A. Dubuque, J. S. C.

Copy. Attest: Simeon Borden, Clerk.

[fol. 22] COMMONWEALTH OF MASSACHUSETTS:

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH, AT BOSTON, JAN. 4, 1924

RESCRIPT

In the case of [title omitted], pending in the Superior Court for the County of Bristol,

Ordered, That the Clerk of said Court in said County, make the following entry under said case in the Docket of said Court, viz:

Judgment for the plaintiff in the sum of $400.

By the Court,

Walter F. Frederick, Clerk.

January 4, 1924.

[fols. 23 & 24] Brief Statement of the Grounds and Reasons of the Decision

See opinion on file.

A true copy. Attest:

Edwin L. Barney, Asst. Clerk.

[fol. 25] [File endorsement omitted.]

[fol. 26] IN THE SUPERIOR COURT OF BRISTOL COUNTY

NOTATION AS TO JUDGMENT

And on the fourth day of February A. D. 1924, said L. L. Cohen & Co., Inc. recovered judgment against said James C. Davis, Agent

as aforesaid, the sum of Four hundred dollars ($100) damages and costs of suit taxed at Ninety-three dollars and fifty-five cents ($93.55).

CLERK'S CERTIFICATE

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, Walter Perley Hall, Esquire, Chief Justice of our said Superior Court, at Taunton, in said County of Bristol, this eighteenth day of March in the year of our Lord one thousand nine hundred and twenty-four.

Edwin L. Barney, Clerk. (Seal of the Superior Court.)

SUPERIOR COURT OF BRISTOL COUNTY

DOCKET ENTRIES

Month Entered: February 1920.

No. 2270

L. L. COHEN & CO., INC.,

vs.

JAMES C. DAVIS, Agent

Plaintiffs: L. L. Cohen & Co., Inc., a corporation duly organized by law and having an usual place of business in Taunton, Mass.
Defendants: James C. Davis, Agent.
Action of Contract.
Ad damnum $2,000.
Plaintiff's Counsel: L. Swig, I. Bertman, Taunton, Mass.
Defendant's Counsel: F. A. Farnham, 591 South Station, Boston; A. W. Blackman; A. W. Blackman, specially for J. C. Davis, Agt.
[fol. 27] Entered Feb. 2, 1920. Pl'ff calls jury.

(1) Decl. Feb. 2-20.

(2) Appearance, Feb. 17-20.

(3) Answer, Feb. 17, 1920.

(4) Mo. and aff. under R. 63, Sept. 26, 1922.

(5) Mo. to amend writ and decl. allowed and process ordered to issue: Sept. 21, 1922.

Order of notice, personal, to 1" Mon. Nov. next to James C. Davis, Agent, issued, Oct. 7, 1922.
Serv. ret., Oct 20, 1922.

(6) Special appearance of J. C. Davis, Agent, Nov. 7, 1922.

(7) Mo. to dismiss of J. C. Davis, Agent, Nov. 7, 1922.
Denied, deft. to have ten (10) days in which to answer, Jan. 2-23.
Def'ts' claim of except. & appeal, Jan. 4-23.

(8) Answer, Jan. 4, 1923.
Motion (4) allowed, Jan. 2-23.
Defendant's exceptions (as to overruling mo. #7), Jan. 6-23.
Allowed, March 13, 1923.
Verdict for defendant by direction of court, Sept. 17, 1923.
Report to S. J. C., Oct. 6, 1923.
Judgment for the plaintiff in the sum of $400: Rescript received, January 5, 1924.
Judgment for plaintiff, February 4, 1924.

Damages, $400.00.
Costs, 93.55.

Copy. Attest: Edwin L. Barney, Clerk.

[fol. 28] SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

STIPULATION AS TO EXHIBIT FOR THE RECORD

It is stipulated and agreed by and between Arthur W. Blackman, Counsel for Plaintiff in Error, and Louis Swig, Counsel for Defendant in Error, that in order to save expense in the printing of the record herein, the original bill-of-lading used in argument before the Supreme Court of Massachusetts and referred to in the second paragraph on page four of the printed record in that Court, need not be printed in full as a part of the record, but that there shall be printed as part of the record only the third paragraph of Section three of the conditions thereof, which reads as follows:

"Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery, claims must be made in writing to the originating or delivering carrier, within six months after delivery of the property (or in case of export traffic, within nine months after delivery at port of export), or, in case of failure to make delivery, then within six months (or nine months in case of export traffic), after a reasonable time for delivery has elapsed; and suits for loss, damage, or delay shall be instituted only within two years and one day after delivery

of the property, or, in case of failure to make delivery, then within [fol. 29] two years and one day after a reasonable time for delivery has elapsed."

Arthur W. Blackman, Counsel for James C. Davis, Agent.
Louis Swig, Counsel for L. L. Cohen & Company, Inc.

[fol. 29½] [File endorsement omitted.]

[fol. 30] IN SUPREME JUDICIAL COURT

[Title omitted]

Argued October 22, 1923

OPINION—Filed January 4, 1924

DE COURCY, J.: On December 13, 1918, the plaintiff shipped from Taunton, Massachusetts, "one carload scrap iron," consigned to Midvale Steel & Ordnance Company, Coatesville, Pennsylvania. A reasonable time for delivery at said destination was not later than two months. The shipment was loaded into a "sideboard flat" car: that is, a flat car open at the top, with wooden sides and ends about four feet in height. The plaintiff placed at one end of the car sheet iron scrap, which was tied up in bundles; at the other end skeleton scrap, so called, which was tied up in bales; and in the middle of the car small particles, known as tack or nail scrap. While the car was in transit and on the lines of the Pennsylvania system, it became reasonably necessary to transfer the contents. The iron was loaded into a battleship hopper car, which, it could be found, was not adapted to the carriage of scrap iron; and in the transfer the fine scrap was loaded on top and mixed in with the other material, so as to render the lading unmarketable and worthless. The consignee refused to accept delivery; and the plaintiff declined to take it on its return to Taunton, about February 19, 1919.

The plaintiff, by writ dated January 9, 1920, brought an action of contract against the New York, New Haven & Hartford Railroad Company, "controlled and operated by the United States Railroad Administration." The plaintiff's motion to substitute James C. Davis, Agent, as party defendant, was allowed in September, 1922. On October 7, 1922, an order of notice issued and was served upon one [fol. 31] Astley, the division superintendent; service on whom would have been good in an action against said railroad company. The defendant Davis appeared specially on November 6, 1922, and filed a motion to dismiss. This motion was denied, subject to the defendant's exception. At the subsequent trial on the merits, the judge directed a verdict for the defendant and reported the case to this court.

As the cause of action in this case arose during Federal control of the railroad, it is now settled that the action should have been

brought against the government and not against the railroad company. Missouri Pacific Railroad v. Ault, 256 U. S. 554. Nominsky v. New York, New Haven & Hartford Railroad, 239 Mass. 254. The contention of the defendant, that the representative of the government cannot be made a party by substitution in any case where the action originally was wrongly brought against the railroad company, is contrary to recent decisions of this court. Aetna Mills v. Director General of Railroads, 242 Mass. 255. Genga v. Director General of Railroads, 243 Mass. 101, 110, 111. Director General of Railroads v. Eastern Steamship Lines, Inc. 245 Mass. 385.

The defendant further contends that in no event can substitution be had later than two years after the end of government control. It is true that § 206 (a) of Transportation Act, 1920 (41 Stat. at Large, 461, provides that after the termination of Federal control, actions, arising out of the operation of the railroad while under such control should be brought "within the periods of limitation now prescribed by the State or Federal statutes but not later than two years from the date of the passage of this Act." But that subsection purports to deal only with the time within which actions may be commenced, where the cause thereof arose during Federal control and no action was brought during that period. In the case at bar, the action was begun January 9, 1920, almost two months before the termination of Federal control. The subsection of the Transportation Act here applicable is 206 (d), which provides that such actions "pending at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final [fol. 32] judgment, substituting the agent designated by the President under subdivision (a)." This subsection contains no time limitation. De Witt v. New York Central Railroad, 196 N. Y. Supp. 870. Henry v. New York Central Railroad, 204 App. Div. 491, 494. Hanlon v. Davis, 276 Pa. St. 113, 118. Even if § 206 (a) were applicable, the Massachusetts law as to amendments does not regard such substitution as the commencement of a new action, and it would have been within the discretion of the trial court to allow the substitution despite the fact that more than two years had elapsed since the termination of Federal control. Aetna Mills v. Director General of Railroads, supra. Genga v. Director General of Railroads, supra. G. L. c. 231, § 138. In view of the Act of March 3, 1923, amending Transportation Act 1920, § 206, we deem it unnecessary to consider the Act of Congress, February 8, 1899 (U. S. Comp. St. § 1594), limiting the time for substitution of a successor in office. See Sack v. Davis, 245 Mass. 114; Director General of Railroads v. Eastern Steamship Lines, Inc. supra. We are of opinion that the motion to dismiss was denied rightly.

As to the merits: On the facts shown the defendant was responsible for the damage to the shipment unless he was relieved from the common law liability by the terms of the bill of lading, or the damage was due to the act or default of the plaintiff itself. The bill of lading is a receipt of the quantity and description of the goods shipped, and a contract to transport and deliver them as specified

in the instrument. Hastings v. Pepper, 11 Pick. 41. The mere description "one carload scrap iron" did not necessarily import that the contents of the car could be mixed or mingled without damage. The owner as one of the contracting parties had a right to judge for itself what arrangement in the car was best adapted for the carriage of its goods. And, while the defendant presumably might have refused to accept the iron for shipment if not satisfied with the packing and position adopted by the shipper, he did not do so, but accepted the carload with full knowledge on the part of his employees of the nature and arrangement of its contents. Hastings v. Pepper, supra. The manner in which the loose scrap was confined [fols. 33 & 34] between bundles of sheet iron scrap and bales of skeleton scrap might well charge the carrier with notice that the division was not random but made with a definite design, and that he should handle the shipment accordingly. Noble v. American Express Co. 234 Mass. 536. Colbath v. Bangor & Aroostook Railroad, 105 Maine, 379. In fact the plaintiff loaded the car, and presumably it was intended that the consignee, and not the defendant, should unload it. So far as appears the shipment as arranged would have gone through without damage but for an intermediate reloading of this bulky freight, weighing more than a hundred thousand pounds: a reloading which apparently was not contemplated by the parties. There was evidence for the jury that the damage complained of was due to the failure of the defendant to provide a suitable car, or the negligence of the employees in unloading and reloading, or both. Pratt v. Ogdensburg & Lake Champlain Railroad, 102 Mass. 557, 567. And, if the goods were received for shipment in good order, the burden was on the defendant to prove that their damaged condition on arrival was due to causes for which he was not legally responsible. Hastings v. Pepper, supra.

The case should have been submitted to the jury. In accordance with the report judgment is to be entered for the plaintiff in the sum of $400.

So ordered.

L. Swig, for the plaintiff.
A. W. Blackman, for the defendant.

[fol. 35] Reporter's certificate to opinions omitted.

[fol. 36] SUPERIOR COURT OF BRISTOL COUNTY

CLERK'S CERTIFICATE

I, Edwin L. Barney, Clerk of the Superior Court, within and for the County of Bristol, do hereby certify that the papers which are

hereto annexed are a true and complete transcript of the record and proceedings in the case of L. L. Cohen & Company, Inc., the corporation plaintiff vs. James C. Davis, Agent, defendant, a true and attested copy of the report and defendant's exceptions to the Supreme Judicial Court, a true and attested copy of the rescript from the said Supreme Judicial Court and a certified copy of the opinion of the Supreme Judicial Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Taunton, this eighteenth day of March, in the year of our Lord one thousand nine hundred and twenty-four.

Edwin L. Barney, Clerk. (Seal of the Superior Court.)

[fol. 37] SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

DEFENDANT'S PETITION FOR WRIT OF ERROR

Now comes James C. Davis, Agent, defendant herein, and says that on the 4th day of February, 1924, this Court entered a judgment against the defendant in favor of the plaintiff, the said judgment having been entered under a rescript from the Supreme Judicial Court, and that in the said judgment and the proceedings had prior thereto in this case, certain errors were committed to the prejudice of the defendant, all of which will appear more in detail from the assignment of errors which is filed with this petition.

Wherefore, the defendant prays for the allowance of a writ of error and such other processes as may cause the same to be corrected by the Supreme Court of the United States.

Arthur W. Blackman, Attorney for the Defendant.

[File endorsement omitted.]

[fol. 38] SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

DEFENDANT'S ASSIGNMENT OF ERRORS

James C. Davis, Agent, defendant in the above entitled action, in connection with and as part of his petition for a writ of error filed herein, makes the following assignment of errors, which he avers were committed in the rendition of judgment and proceedings appairing on the record.

I

The Supreme Judicial Court for Massachusetts in holding that the representative of the Federal Railroad Administration can be made

a party by substitution in any case where the action originally was wrongly brought against the railroad corporation is permitting a course of procedure contrary to the terms of General Order 50 and General Order 50 A of the United States Railroad Administration.

II

The Supreme Judicial Court for Massachusetts in permitting the representative of the Government to be made a party by substitution [fol. 39] in an action originally wrongly brought against the railroad corporation was deciding a matter of substance and not of procedure, and was applying the particular policy of the Commonwealth of Massachusetts in relation to a Federal question. This is contrary to the policy of Congress as expressed in the Transportation Act.

III

In holding that, in an action against the Government, the representative of the Government may be made a party by substitution where the action originally was wrongly brought against the railroad corporation, the decision reads into the consent given to sue the Government a permission to proceed in a way not authorized by the consent given.

IV

The decision holds that substitution may not only be had, but that it may be had later than two years after the end of Government control. This is in conflict with the Transportation Act.

V

The decision holds that substitution may be had at a time more than two years and one day after a reasonable time for delivery of the property had elapsed. This holding is in conflict with the uniform bill of lading authorized by the Interstate Commerce Commission and used by the carriers, and is, therefore, in conflict with the Act to Regulate Commerce.

VI

In holding that the representative of the Government can be made a party by substitution in an action originally brought against [fol. 40] the railroad company at a time more than two years after a reasonable time for delivery of the property and at a time more than two years after the passage of the Transportation Act, the Supreme Judicial Court of Massachusetts holds that such substitution is not the commencement of a new action. This is in conflict with the Transportation Act and also with principles of law enunciated by this Court.

VII

In holding that substitution may be had later than two years after the end of Government control, the Supreme Judicial Court of Massachusetts holds that Section 206 (a) of the Transportation Act purports to deal only with the time within which actions may be commenced where the cause of action thereof arose during Federal control and no action whatever was brought during that period. This is in conflict with the Transportation Act which applies to any and all proceedings instituted thereafter against the Government.

VIII

In deciding that the representative of the Government can be made a party by substitution at a time later than two years after the end of Federal control, the Supreme Judicial Court holds that the service as made was lawful and valid. This is in conflict with the Transportation Act.

Wherefore, the defendant prays that the judgment of the Superior Court, entered as aforesaid under the rescript from the Supreme Judicial Court, may be reversed and a judgment rendered in favor of the defendant and for costs.

Arthur W. Blackman, Attorney for Defendant.

[fol. 40½] [File endorsement omitted.]

[fol. 41] WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

(Seal of the United States District Court, Massachusetts.)

The President of the United States to the Honorable the Judges of the Superior Court of the Commonwealth of Massachusetts, holden at Taunton, within and for the County of Bristol and said Commonwealth, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court before you, or some of you, being the highest court of law or equity of the Commonwealth of Massachusetts in which a decision could be had in the said suit between L. L. Cohen & Company, Inc., Plaintiff, and James C. Davis, Agent, Defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United

States, and the decision was in favor of their validity; a manifest error hath happened, to the great damage of the said James C. Davis, Agent, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the tenth day of March, in the year of our Lord one thousand nine hundred and twenty-four.

James S. Allen, Clerk of the District Court of the United States, District of Massachusetts.

Allowed by Walter Perley Hall, Chief Justice of the Superior Court of Massachusetts.

[fol. 42] COMMONWEALTH OF MASSACHUSETTS,
Bristol, ss:

And now, here, the Judges of the Superior Court for the Commonwealth of Massachusetts, holden at Taunton, within and for said County of Bristol, make return of this writ by annexing hereto and sending herewith, under the seal of the said Superior Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I, Edwin L. Barney, Clerk of said Superior Court, have hereto set my hand and the seal of said court this eighteenth day of March, A. D. 1924.

Edwin L. Barney, Clerk. (Seal of the Superior Court.)

[fol. 43] BOND ON WRIT OF ERROR FOR $500—Omitted in printing

[fol. 44] SUPERIOR COURT OF BRISTOL COUNTY

[Title omitted]

CERTIFICATE OF LODGMENT

I, E. L. Barney, Clerk of the said Court, do hereby certify that there was lodged with me as such clerk on March 11, 1924, in the matter of James C. Davis, Agent versus L. L. Cohen & Company, Inc., a corporation,

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth,—one for the defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Taunton, Massachusetts, this eighteenth day of March 1924.

Edwin L. Barney, Clerk Superior Court of Bristol County, Massachusetts. (Seal of the Superior Court.)

[fol. 45] CITATION—In usual form, showing service on Louis Swig; omitted in printing

Endorsed on cover: File No. 30,209. Massachusetts, Bristol County, Superior Court. Term No. 899. James C. Davis, agent, plaintiff in error, vs. L. L. Cohen & Company, Inc. Filed March 20th, 1924. File No. 30,209.